UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE HOLOCAUST VICTIM ASSETS LITIGATION Application of Burt Neuborne	Docket No. 06-983 (ERK) (JO)

SUPERSEDING MEMORANDUM OF LAW OF THE SETTLEMENT CLASS IN OPPOSITION TO THE APPLICATION OF LEAD SETTLEMENT COUNSEL FOR COUNSEL FEES

The Settlement Class submits this Superseding Memorandum of Law in opposition to the Fee Application of Burt Neuborne which seeks over $4 million in fees and reimbursement of expenses. What is at issue is the integrity of the Fee Application. This proceeding is **not** about:

- Whether Mr. Neuborne is brilliant
- Whether some counsel are dissatisfied with this Court's rulings
- Whether the plan of allocation of *cy pres* monies is fair

I. CLASS NOTICE IS MANDATORY

The Class urges the Court to require class notice consistent with FRCP 23(h)(1). Rule 23(h)(1), which became effective in 2003, states "[n]otice of the motion [for award of attorneys fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner." This language is mandatory, not precatory. Although notice to class members was given in 1999 or 2000 as to fees that might be sought up to that time, the current

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Application cannot be grandfathered to that notice. The substantial fees sought here are for work performed subsequent to the signing of the Settlement Agreement and were not contemplated by the earlier notice.

The amendments to Rule 23 were adopted in part because of the outcry against "coupon" settlements, and Rule 23(h)(1) was part of the remedy. In "coupon" settlements, class members receive "coupons" for redemption and counsel receive a fee in cash. For over 100,000 class members -- members of the Looted Assets Subclass -- the settlement was fair, but the allocation does not even give them a coupon. They released all of Switzerland from their claims, but will get neither payment on their claims nor a *cy pres* award. If no class notice is given, they will neither know about nor have the opportunity to object to Mr. Neuborne receiving over $4 million in fees. This is contrary to the Congressional intent of the Rule 23 amendments.

Class Counsel are concerned that the cost of class notice is significant to a class of over 500,000.[1] However, class notice under Rule 23(h)(1) is a component of due process; Congress did not create exceptions based on relative cost. The most efficient solution in this case is to fashion a new class notice which serves a dual function: informing the class of the status of settlement distribution and the rulings of the Court of Appeals as well as the multiple applications for counsel fees.

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[1] There are more than 500,000 persons worldwide who responded to the questionnaire sent by the Court in 1999 or 2000. The specialists employed by the Court to give class notice in the past recommend that any new class notice be given by mail to the database of questionnaire respondents, and the notice include an update on the status of the distribution. They estimate the cost of mailing a double-sided letter to the database as between $560,000 and $600,000. Some savings could be realized in the postage component (approx. $260,000) by using a postcard format in the United States and Canada. They regard posting on the class' website as inadequate notice by itself, pointing out that in February 2006 there

II. Counsel Who Represented Himself as Acting *Pro Bono* and Failed to Disclose a Secret Agreement With the Court for Compensation Is Not Entitled to Compensation

Counsel for Schaecter *et al.* has demonstrated that on numerous occasions after February 1999 Mr. Neuborne represented in writing that he was acting *pro bono* for the class and not distinguishing, as he does now, between his pre-settlement time and post-settlement time. Having reaped accolades for serving *pro bono*, it now appears the writings were not truthful and his *pro bono* service after January 1999 was an illusion.

Mr. Neuborne also claims that the Court drafted him, over his opposition, as Settlement Lead Counsel with a promise of compensation.[2] During a conference with the Court on March 3, 2006, the Court supported this claim. If compensation

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were 5,600 "hits" on the website and there is no way of determining how many were by class members.

[2] Mr. Neuborne suggests in his memorandum that he was indispensable to obtaining approval of the settlement and allocation. The short answer is to repeat the aphorism that cemeteries are full of indispensable people. The longer answer is that, for less than $700 per hour, the Court could have engaged any number of talented New York City attorneys who would have served the Class faithfully and obtained at least the same results.

was agreed upon -- and Mr. Neuborne has offered no documentation for it – there was a duty of disclosure to all Class Counsel and the Class in the class notice. *See also* NY Lawyer's Code of Prof. Responsibility at Canon 2-19; NY Disciplinary Rule 2-106. At the very least, notice thereof should have been filed in the docket.[3] More importantly, this information should have been contained in the initial class notice. Since the Court was party to the arrangement, the Court should have insisted upon such disclosure or entered an Order. A hearing was held by the Court on January 5, 2001 to discuss the Court's views on fees and costs, and either Mr. Neuborne or the Court should have disclosed the arrangement at that time.

The arrangement here is analogous to the practice of some courts to have plaintiffs' counsel "bid" to handle litigation at the outset. *See e.g. In re Auction Houses Antitrust Litigation*, 197 F.R.D. 71 (SDNY 2000); *In re Amino Acid Lysine Antitrust Litigation*, 918 F.Supp. 1190 (ND Ill. 1996). In the *Lysine* litigation fees were inclusive of settlement administration. The advantage of open bidding is that the court can choose qualified, experienced counsel at the least cost to the class. But such instances always entail public disclosure, which was not the case here.

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[3] In his defense, Mr. Neuborne claims that he mentioned he would seek fees in a footnote in his law review article published by a third tier law school in 2003. A buried footnote in a lengthy law review article in an obscure law review is hardly the type of notice appropriate to overcome his other public assertions.

Indeed, it is baffling why there was no disclosure of the arrangement in this case until the Fee Application was made in December 2005.

The fact that some of Mr. Neuborne's friends among Class Counsel are not surprised that he is seeking a fee for post-settlement work does not discharge Mr. Neuborne's obligation of disclosure. None of these friends assert knowledge of Mr. Neuborne's alleged arrangement with the Court. It is noteworthy that none of these lawyers dispute that, as the Court itself found in the past, there were other well-qualified lawyers willing to work *pro bono*. Instead of tapping that source for the bulk of the post-settlement work, Mr. Neuborne monopolized the work knowing – but not disclosing -- he would seek a fee. It is no defense at this point in time to speculate on whether some *pro bono* counsel would have refused to work if requested. The fact is there was no delegation of work and no request to *pro bono* counsel. The undersigned did work *pro bono* after November 30, 2000 including when asked to furnish a declaration regarding the blunder in Mr. Neuborne's negotiation of Amendment No. 1 to the Settlement Agreement; and another lengthy declaration addressing the negotiation of the release for "after-acquired" Swiss companies.

III. The Fees Sought Are Excessive

A. An Hourly Rate of $700 Is Not Justified

In response to the Class' objection that $700 per hour would be an excessive rate of compensation, Mr. Neuborne asserts that he has a single (undisclosed) client paying him at that rate to argue a case in the United States Supreme Court. One client does not determine a fair hourly rate. There is no disclosure as to whether that client would be prepared to pay him at that rate for an unlimited number of hours, or just a discrete number of hours. Moreover, work in the Supreme Court is not an equivalency for over 8,000 hours of work done in this case, the majority of which hours were spent on mundane tasks.

Mr. Neuborne does not disclose his salary as a law professor; nor does he quibble with the $150,000 annual rate for 1,600 hours suggested by the Class. Nor does he assert that he bears any overhead -- such as the overhead of a New York City lawyer with multiple clients all paying his firm an hourly rate of $700. Several of Mr. Neuborne's friends filed declarations supporting a hypothetical rate of $700 per hour if Mr. Neuborne were in private practice. But he is a law school professor. They omit mentioning that $700 is the rate per hour the law firm receives for a lawyer billing at $700 per hour, not the lawyer. Hourly rates are high in New York City in part because the cost of practicing is high there. If compensation is awarded on the Fee Application, Mr. Neuborne will receive 100% of his hourly rate since his overhead is covered by his law school.

In *New York State Ass'n for Retarded Children v. Carey*, 711 F.2d 1136, (2d Cir. 1983) the Court of Appeals observed:

> We begin by noticing that an award to non-profit lawyers based upon billing rates charged by profit-making lawyers inevitably produces a windfall. The billing rate for a profit-making law firm typically includes three components: the compensation of the billing attorney, a share of the firm's overhead, and some profit for the firm. Obviously the profit component is a questionable ingredient in a "reasonable" fee for a non-profit law firm. In addition, the two remaining components of a private firm's billing rate would often reflect much higher expenses than those incurred by a non-profit office. Private firms in New York City usually pay their associates more than most attorneys earn in non-profit offices. Moreover, large private firms like Cravath incur overhead expenses far higher than those of non-profit firms. They pay premium rents, and they maintain the personnel and other resources necessary to provide the extensive legal services and quantity of documents required on short notice in connection with corporate and securities practices.

Although the holding in the above case was overruled in fee-shifting cases by the Supreme Court's decision in *Blum v. Stenson*, 465 U.S. 886 (1984), the Court of Appeals' reasoning is unassailable and has continued to be applied in common benefit fund litigation. For example, Judge Weinstein in *In re Agent Orange*, 611 F. Supp. 1296, 1330 (E.D.N.Y. 1987) awarded lesser fees to law professors stating:

> … the *Blum* Court's decision was based on legislative intent, a ground that is absent in common fund cases. The $125 hourly rate reflects the practical differences between the situations of the professors and those of private attorneys. Involvement in this case from the law professors' point of view presented relatively little risk. Professors do not depend on practicing law for their livelihood. The professors who worked on "*Agent Orange* " did not

> have to give up any clients. Nor did their participation take away time from other cases. Professors do not need the kind of bread and butter work that a practicing lawyer requires.

Moreover, courts do not look to hypothetical rates such as those quoted by Mr. Neuborne's friends, they look to real rates paid in the marketplace to the applying lawyer – and then compare that rate to comparable rates in the marketplace. Otherwise, all lawyers could contend they deserve higher rates that they actually receive – so long as their friends submit declarations in support thereof. Attached to the Superseding Declaration of Robert A. Swift is a 2005 listing by a nationwide legal consulting firm showing the highest median hourly rates for litigators. The highest median rate is $380 per hour. The Court should also consider that in *In re Austrian and German Bank Holocaust Litigation*, 2003 WL 402795 (S.D.N.Y. 2003) the highest hourly rate allowed was $250 per hour for at-risk contingency work.

Mr. Neuborne tries to justify his hourly rate on the basis that he is brilliant, as several of his friends proclaim. Whether he is or not is irrelevant. The question is whether brilliance was evident in all – or any -- of the 8,000 hours. Experience suggests that the practice of litigation is 1% creativity and 99% hard work. That would apply to the post-settlement work in this litigation. While there was discord among class members as to aspects of the settlement, there was little chance the $1.25 billion settlement would not be approved. Certainly there was no brilliance demonstrated in misleading the Court of Appeals that the German Foundation Settlement may cover all Looted Assets Subclass claimants (*see In re Holocaust Victim Assets Litigation*, 2001 WL 868507, *2 (2d Cir. 2001) when, in fact, that settlement expressly excluded any claim that could have been made during the preceding 55 years; or in advocating a *cy pres* distribution which eliminated hundreds of thousands of looted assets subclass members whose claims were released in the settlement.

Finally, the $700 rate is excessive considering the availability of other lawyers willing to work on a *pro bono* basis. Thus, if half or more of the 8,000 hours of work could have been performed for free or at associate rates, justification is lacking for paying the highest rate for all 8,000 hours.

B. Mr. Neuborne Inflates His Enhancements to the Settlement

Mr. Neuborne claims that he added $56 million of value to the $1.25 billion settlement in numerous ways. First, he credits himself for federal legislation making payments under the settlement free of United States income taxes. While the result was worthy, the fund was not increased and the credit goes to Congress, not Mr. Neuborne.

Second, Mr. Neuborne claims he obtained "additional" interest of $5 million as a result of litigation before Judge Block. This is not so. When Mr. Neuborne negotiated Amendment No. 1 to the Settlement Agreement in November 1999, he mistakenly reduced the interest rate being earned on the settlement funds being held by the defendant banks. When Mr. Neuborne discovered this, he requested the assistance of the undersigned and others to confirm the original intent of the Settlement Agreement regarding interest. With declarations provided by the undersigned and others, Mr. Neuborne prevailed in restoring the original interest rate.

Third, Mr. Neuborne takes credit for negotiating the insurance amendment to the Settlement Agreement. This is a true enhancement that the undersigned negotiated with Mr. Neuborne that provided for certain Swiss insurance companies to match payments to insurance claimants. While the agreement provided for matching up to $50 million, there was no expectation insurance payouts would approach that level. In fact, other objectors have pointed out that only $300,000 has been paid under this enhancement, making the enhancement worth $150,000.

Finally, Mr. Neuborne properly takes credit for negotiating Amendment No. 2 to the Settlement Agreement. This provided for the final installment payment of $334 million to be paid a year earlier, producing approximately a $20 million enhancement.

C. The Time Charged Is Excessive

A starting point for the examination of Mr. Neuborne's time records is the observation that, even for a hard-working attorney, any day with over 11 or more billable hours is suspect.[4] Mr. Neuborne's time records disclose a surprising number of such days, always with terse descriptions of tasks performed. In addition, individual telephone calls lasting several hours are suspect.

1. Mr. Neuborne Has Not Explained the Anomalies in His Records

The Class pointed out several anomalies – both on a micro and macro level -- in Mr. Neuborne's time records in its earlier submission. Since Mr. Neuborne knew since January 1999 he would be filing a fee application based on his hours worked, he understood the importance of keeping accurate and detailed records.[5] His explanation for billing 24 or more hours in a single day (i.e. he says the billing was for a task that really covered two days) is not credible when in the second day he is also billing 16 or more hours. Mr. Neuborne's time records provide a paucity of information to support long stretches of time. In addition, the Class agrees with the anomalies identified in the Opposition of Schaecter *et al.*

On a macro level, the Class questioned how Mr. Neuborne could have devoted 1,800 billable hours to work on this matter in the year 2000 when he was fully employed as a law school professor (assume 1600 hours) and also devoted

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4 There may be exceptions, such as when counsel travel overseas and bill for their travel.

5 Mr. Neuborne disclosed to the undersigned that he did not keep time records of his work at least through the execution of the Settlement Agreement in January 1999.

627 hours to the German Holocaust litigation and settlement (as his counsel informs the Class). While it may be mathematically possible for a lawyer to work 4,027 hours in a year -- which equates to 11.03 hours for every day of the year – it is highly unlikely. If accurate, the quality of the hours billed becomes highly suspect. Mr. Neuborne's explanation is suspect. He contends that in 2000 he only devoted 150 hours to law school work. That is highly unlikely since law school professors perform myriad tasks other than teaching, serve on multiple committees and are expected to engage in academic research and writing as part of their compensation – especially during sabbatical leaves.

In short, it is Mr. Neuborne's burden to establish the accuracy and credibility of his records, and the Class believes the Court must closely scrutinize the records.

2. Mr. Neuborne Failed to Delegate Tasks to Others

The Manual for Complex Litigation approves the designation of lead counsel and requires that counsel "act fairly, efficiently and economically in the interests of all parties and parties' counsel." Manual (Fourth) at §10.221. It was not efficient and economical for the Class to have Mr. Neuborne monopolize all the work when other counsel were willing to work *pro bono*. Nor was it necessary that all the work be performed at Mr. Neuborne's experience level. Mr. Neuborne asserts that $15 per hour law students could not do the research he was doing. Whether or not that is true in part or in whole, he does not dispute that lawyers at the $200 per hour associate level could; or partners at a $350 level could. The Class should not be charged at a higher rate for work – if done on a commercial basis – that should have been billed at a lower rate.

The fact is that over a seven year period Mr. Neuborne never called a meeting of all Settlement Class Counsel. Nor did he periodically inform all Settlement Class Counsel of developments in the litigation. The rationale for monopolizing the work – and not sharing information – is that he wanted only his views to be heard in speaking for the Class. It is not a sufficient answer to assert that other counsel did not share his point of view regarding allocation. Pre-settlement, when there were two lead counsel and an executive committee of ten, the Class benefited from a rich diversity of talent and views. Post-settlement, Mr. Neuborne attacked Settlement Class Counsel with views different from his. Hence, the lack of delegation was intentional and should not be rewarded.[6]

3. The Court Should Compensate Mr. Neuborne from a Separate Fund for Acting as the Court's General Counsel

A non-trivial portion of Mr. Neuborne's time was devoted to, as this Court described it, acting as the Court's "General Counsel." There was an implicit conflict in Mr. Neuborne serving both as Lead Settlement Counsel and undisclosed

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6 A clear example is that in August 2004 Mr. Neuborne moved to strike an appellate brief submitted by the undersigned on behalf of the Class as a whole. When the inquiry by the Clerk's Office threatened Mr. Neuborne's own standing, this Court issued a *sua sponte* opinion explaining Mr. Neuborne's position.

counsel to the Court. Mr. Neuborne, made all the decisions as to the position of the Class without consulting all settlement counsel or informing them of his dual role. The adversarial system collapsed. This is evident in the detail of Mr. Neuborne's time records listing *ex parte* meetings and phone calls with the Court and special master as well as the Court's own description of conversations with Mr. Neuborne over substantive issues. It is a fact in this litigation that a vast number of class members who released looted asset claims will receive no compensation whatsoever on a claims made or *cy pres* basis as a result of rulings by this Court. In zealously supporting those rulings in the Court of Appeals, Mr. Neuborne was acting as counsel for the Court, not the Class as a whole.

Putting aside the undisclosed conflict, Mr. Neuborne must allocate his time for each role and bill his time as counsel to the Court separately. The undersigned understands that there is a fund available to the Court for compensating counsel who assist the Court, and the hourly rate is fixed by the Justice Department. There is precedent for this approach in the Holocaust cases. David Boies was retained by the Court in the Southern District of New York to perform services in the Court of Appeals in defending a mandamus action. His rate was $125 per hour. Mr. Neuborne should be compensated from that same fund for his time spent assisting the Court.

IV. Conclusion

The Class does not dispute the right of class counsel to be paid at a fair rate for services performed to benefit the Class in post-settlement matters. Nor does it dispute that some of the work performed by Mr. Neuborne benefited the Class as a whole. However, Mr. Neuborne was widely understood and credited with performing services *pro bono* as Settlement Lead Counsel. No one forced him to make his assertions. Further, the rationale for his rendering *pro bono* services – that it would be inappropriate to accept fees from members of the class of Holocaust – has not changed. There was a duty of disclosure which was not honored.

Should the Court decide to compensate Mr. Neuborne, then it must carefully scrutinize the anomalies in his records and decide on a fair hourly rate which reflects commercial reality and the nature of the work performed; while excluding time for work that could have been done by others on a *pro bono* basis or others at lesser hourly rates, and time devoted to the representation of the Court.

Respectfully submitted,

March 17, 2006

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